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IN THE

# Supreme Court of the United States

October Term, 197—

No. 77-73

THE PILLSBURY COMPANY, WILLIAM H. SPOOR, C. DEAN McNEAL, HENRY FUNK, L. D. COMPTON, HENRY A. BROWN and DOUGLAS J. DENNETT,

*Petitioners,*

vs.

MARCELINE DONALDSON,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners, The Pillsbury Company, William H. Spoor, C. Dean McNeal, Henry Funk, L. D. Compton, Henry A. Brown and Douglas J. Dennett respectfully petition this Court for a writ of certiorari to review an order of the United States Court of Appeals for the Eighth Circuit entered in this case on April 14, 1977.

## OPINIONS BELOW

Two opinions of the Court of Appeals are reported in 14 FEP 1111 (8th Cir. 1977) and 429 F. 2d 979 (8th Cir. 1976) and are reproduced in the Appendix hereto.

Two opinions of the District Court are reported in 406 F. Supp. 1210 (D. Minn. 1976) and 11 FEP 577 (D. Minn. 1975) and are reproduced in the Appendix hereto.

The May 9, 1977 order of the Court of Appeals denying the petition for rehearing en banc is presently unreported and is reproduced in the Appendix hereto.

## JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1977. On May 9, 1977 the Court of Appeals denied petitioners' petition for rehearing en banc. The jurisdiction of this Court is invoked under 29 USC §§1254(1) and 2101.

## QUESTIONS PRESENTED

1. Did the Court of Appeals err when it reversed the District Court and certified a Title VII class where:

   a. The Court of Appeals certified the class in the first instance, and



   b. The Court of Appeals certified the class without definition or discussion merely by negative implication from two brief footnotes, and

   c. The Court of Appeals certified the class merely on the basis of allegations?

2. Did the Court of Appeals act erroneously when it set aside the District Court's order dismissing all of Marceline Donaldson's individual claims without disturbing any of the District Court's extensive findings discrediting both the merit of Ms. Donaldson's complaints and her personal credibility?

3. If the District Court's dismissal of Marceline Donaldson's individual claims is affirmed, no class having ever been certified in the District Court, can any class be adequately represented in subsequent proceedings in this action before the District Court?

## STATUTES AND RULES INVOLVED

42 USC §§2000e *et. seq.*

Federal Rule of Civil Procedure, Rule 23(a):

"Rule 23. CLASS ACTIONS

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class."

## STATEMENT OF THE CASE

This action presents claims of employment discrimination raised by a black female former employee (Donaldson) against her former employer, The Pillsbury Company, and six individuals who were her supervisors (Pillsbury). These claims are raised under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et. seq.* and 42 U.S.C. §§1981 and 1985.

The complaint in this action was filed on April 3, 1974 and subsequently amended on November 8, 1974. On January 20, 1975 the District Court first heard Donaldson's motion for class certification, whereby she sought to represent a single consolidated class of all past and present black and female persons employed or denied employment within the Pillsbury "Headquarters" located in Minneapolis, Minnesota. The District Court deferred ruling on the class motion and granted Donaldson's request for additional time to complete discovery. The class motion was resubmitted and re-argued on September 15, 1975, at which time the Court denied class certification on the grounds that Donaldson had failed to demonstrate typicality with the class she sought to represent or satisfaction of the additional requirements of Rule 23(a) of the Federal Rules of Civil Procedure. Before the District Court at the time of its class ruling were affidavits submitted by Pillsbury describing the organizational and hierarchical structure of its various independently managed operating companies having headquarters operations in the Minneapolis area, further describing the nature of non-headquarters facilities in the same locale and demonstrating how the limited experiences of Ms. Donaldson within the company were isolated and unique relative to policies, practices or supervisors applicable to other company employees. These affidavits were and remain uncontested in the record.



Subsequently, on November 7, 1975, Donaldson moved the District Court to reconsider its class action ruling, submitting six affidavits of individuals who claimed to themselves have been discriminated against by Pillsbury. Still finding no factual nexus between Donaldson and any other proported class members on the basis of the record before it, the District Court denied the motion for reconsideration. Donaldson's attempt to seek appellate review of that denial was rejected as untimely by the Court of Appeals for the Eighth Circuit in an Opinion filed February 5, 1976.[1]

Donaldson's individual claims of discrimination proceeded to trial on January 6, 1976. Those claims, as recited in the District Court's Final Memorandum and Order, dated February 5, 1976, were that she was denied adequate training and supervision, that she was denied promotion, that she was denied office, telephone and secretarial arrangements, and that she was unfairly treated and ultimately discharged all because of her race and sex and in retaliation against her complaints about alleged company discrimination. The District Court heard evidence from all parties relating to these claims, found those claims to be without merit, and found Donaldson not to be a credible witness.

Statistical evidence was ultimately received and considered by the Court and found not to be persuasive of contrary conclusions. Testimony of several persons was offered by Donaldson at trial to demonstrate that other persons working in other parts of the company also had complaints about the way Pillsbury treated them. The District Court specifically invited Donaldson to call any witnesses who had anything to say about her employment experiences or her supervisors or policies or

[1] The substance of this ruling was communicated informally to the parties and the District Court by the Court of Appeals in advance of trial.

practices to which she was subject. The direct testimony of one witness, Dennis Barrett, identified by her counsel as typical of a group of witnesses Donaldson sought to call, was heard by the Court. That testimony related to the experiences of Mr. Barrett dealing with an allegedly biased Pillsbury foreman in Terre Haute, Indiana. The District Court thereupon requested counsel for Donaldson to prepare and submit written offers of proof delineating the testimony of additional similar witnesses she sought to introduce. After reviewing these offers of proof, prepared by plaintiff's counsel, untested by cross-examination or contradicting company evidence and viewed, therefore, in a light most favorable to Donaldson, the District Court ruled in its Final Memorandum and Order that the proffered testimony, even if true, did not alter its findings and conclusions, based on all direct evidence of Donaldson's experiences and treatment relative to those of fellow, comparably situated white male Pillsbury employees.

The evidence received at trial showed that Donaldson was hired into a professional job by Pillsbury on February 1, 1972. She was first assigned to work in the corporate staff Personnel Department and was later transferred, at her own request, to a higher-paying marketing position in the International Operations Company in September of 1972. Her rate of pay was comparable to that of white males having significantly greater education, experience and tenure with the company than she. She was provided written job descriptions and work objectives, but she performed her assignments superficially and exhibited an uncooperative and insubordinate attitude. She was frequently tardy and absent from work without justification and once was absent for personal reasons which were specifically disapproved by her supervisor shortly in advance of the absence. She was discharged on January 31, 1973.



By an Opinion filed April 14, 1977, the Court of Appeals set aside the District Court's order dismissing Donaldson's claims, ruling that the District Court had failed to adequately consider statistical evidence and the testimonial evidence which was the subject of the written offers of proof. The Court of Appeals further reversed the denial of class certification and implicitly, through a concluding footnote, certified in the first instance, without definition or discussion, a class apparently "as broad as the class claimed."[2] One member of the three judge panel dissented from that portion of the Court of Appeal's opinion which set aside the dismissal of Donaldson's individual claims and expressed "serious reservations concerning the ability of the plaintiff to properly represent the class she seeks to represent in view of the fact that her own case was so completely without merit."

Pillsbury's subsequent Petition for Rehearing En Banc was summarily dismissed on May 9, 1977.

## REASONS FOR GRANTING THE WRIT

**1. Certification of a class in the first instance by the Court of Appeals raises an important federal question recently recognized but not yet decided by this Court.**

This Court very recently had occasion to recognize and comment upon the existence of the first fundamental question presented by the instant petition. In *East Texas Motor Freight System, Inc. v. Rodriquez*, —— U.S. ——, 97 S. Ct. 1891, —— L. Ed. 2d ——, (1977), this Court found it appropriate to comment that in that particular matter ". . . we do not reach the question whether a Court of Appeals should ever certify a

[2] See Footnote 6 of the Court of Appeals Opinion.

class in the first instance. For it is inescapably clear that the Court of Appeals in any event erred in certifying a class in this case, . . ." 97 S. Ct. at ——. While *Rodriquez* did not compel confrontation of this basic issue, the present case does.

The significance of this issue derives primarily from the inherent function of a Court of Appeals as a reviewing rather than a de novo fact-finding body. If the proposition stands unchallenged that a Court of Appeals may undertake to certify a class in the first instance, then the virtually inescapable conclusion for District Courts confronted by class litigation of every kind is that Rule 23 of the Federal Rules of Civil Procedure requires no factual determinations but rather requires more artful pleading of allegations.[3]

While this Court and other courts have repeatedly commented that discrimination actions are generally amenable to class treatment since they involve claims of discrimination on the basis of a class characteristic, this Court and other courts have also recognized that mere allegations alone cannot satisfy Rule 23.[4]

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[3] Petitioners recognize that a class action certification determination does not call for a "preliminary hearing" on the merits of plaintiff's claims. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974). The issue which petitioners raise herein is whether such a determination does necessitate inquiry into facts pertaining to the existence or non-existence of circumstances satisfying each of the four elements of Rule 23(a). In the context of this Title VII action, petitioners submit that pertinent facts would include: the nature and scope of applicability of specific allegedly discriminatory company policies, the sources of company personnel policy decision-making, the degree of independence of supervisor hierarchies from which policies or practices might flow to or impact upon employees, the character of the individual employment experiences of the candidate class representative as compared to the employment circumstances of purported class members and other factors relating to the representative capacities of Ms. Donaldson.

[4] *Poindexter v. Teubert*, 462 Fd. 2d 1096 (4th Cir., 1972). *Cash v. Swifton Land Corp.*, 434 F. 2d 569 (6th Cir. 1970).



In *Rodriquez*, this Court observed:

> "We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving class-wide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable." 97 S. Ct. at ——.

Given that at least some degree of fact-finding is necessarily involved in a decision to certify a class, it is important for this Court to clarify that no class should be certified by a decision-making body not chartered or equipped to find facts. Even if the Court of Appeals properly determined that the District Court was clearly erroneous when it ruled that class certification should be denied, it lacked sufficient grounds to go further than to remand the case to the District Court with instructions to reconsider class certification and to certify and carefully define whatever class appeared to be appropriate in light of the prevailing facts and the Rule 23 legal guidelines, as elucidated by the Court.

**2. This case squarely presents issues pertaining to the role of the District Court in class certification determinations in Title VII actions which this Court should address.**

Few issues before the federal judiciary carry greater significance for both the manageability of trial dockets and the administration of justice to litigants than the delineation of workable guidelines for determination of the appropriate scope of Title VII lawsuits. While this Court has frequently elaborated and clarified issues concerning the receipt and sig-

nificance of evidence at trial[5] and the remedies which are appropriate in Title VII actions,[6] the Court has never since the passage of Title VII addressed in comprehensive fashion the factors which bear upon certification of a Title VII class. Yet it is the class certification stage of proceedings such as this which is by far the most significant to the District Court and the parties. Especially where, as here, a single plaintiff, whose claims have been found to be completely lacking in foundation by a respected Chief District Judge, seeks to represent a very loosely defined class of blacks and females throughout a large national and international company's very diverse and fragmented headquarters, this Court's attention to the potential extravagant investment of time, expense and judicial resources compelled by undisciplined class certification is warranted.

In this case, the Court of Appeals completely disregarded uncontradicted factual showings by Pillsbury[7] and the subse-

[5] *International Brotherhood of Teamsters v. U.S.*, —— U.S. ——, 97 S. Ct. 1843, —— L. Ed. 2d ——, (1977); *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971).

[6] *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975).

[7] Before the District Court at the time of its class certification decisions (and never commented upon nor apparently considered by the Court of Appeals) were uncontradicted affidavits submitted by Pillsbury to demonstrate the factual characteristics of its Twin Cities headquarters operations. The record upon which the District Court acted demonstrated that the Grocery Products Company, the International Operations Company, the Refrigerated Foods Company, the Agri-Products Company and the various corporate staff departments were and are independently managed, with separate personnel offices independent of and not subordinate to the staff employment department. The only common source of policy revealed on the record is the Board of Directors, acting through its chairman. If the mere fact of the existence of a Board of Directors with umbrella powers is sufficient foundation for a company-wide class, no matter how large, diverse, complex or heterogeneous is that company, then all Title VII cases must, if requested, be company-wide. Moreover, Marceline Donaldson praised rather than criticized Robert J. Keith, the then Chairman of the Board for his attitude toward equal employment. An ample record supports the Chief District Judge's finding that appellant's claims shared no common source with claims of any other persons she identified.



quent findings of the District Court as to the isolation of Marceline Donaldson from the policies and practices about which she claims other individuals whom she named have reason to complain.[8] The Court of Appeals instead advanced the sweeping proposition that the Rule 23(a)(2) requirement of commonality, as applied to Title VII actions, is satisfied merely by "allegations of class-based discrimination in hiring and employment practices." The Court further found that the Rule 23(a)(3) typicality requirement is met in a Title VII case simply if the plaintiff's *allegations* of employment discrimination are "rooted in the same bias asserted as the source of discrimination." The typicality provision was further characterized as a solely "quantitative" requirement, satisfied by *allegations* "that a significant number of other members of the class have been similarly victimized by the same patterns and practices." Finally, controlling significance appears to have been attached to the fact that "the claim arises out of the same legal or remedial theories". The language of the Court of Appeals' opinion thereby sanctions the proposition that a single person, no matter how lacking in accurate perception or integrity, can subject an employer and a United States District Court to the enormous expense and burden of full contest of all the employer's employment policies and practices across as broad a range of the employer's organization as that single person, assisted by resourceful counsel, can cleverly

[8] See footnote 3, *supra*.

draft conclusory allegations of discrimination.[9]

This facile application of Rule 23 to this Title VII action, placing, as it does, virtually exclusive reliance on mere allegations, does not comport with the "careful attention" already mandated by this Court in *Rodriquez, supra*. Given such a construction of Rule 23 in a Title VII context, a District Court faces expropriation of its traditional latitude and discretion to react to the particular circumstances before it and administer proceedings in a fashion which avoids the necessity of redundant litigation without unproductively expanding the scope of the lawsuit to issues and controversies entirely outside the realm reasonably called into scrutiny by the individual plaintiff's complaint.[10]

Persons alleging discrimination in differing forms may still have "similar grievances". Thus is it that one who was in fact hired may represent a class including persons allegedly not hired because of discrimination. *Long v. Sapp*, 502 F. 2d 34

[9] The reliance of the Court of Appeals upon allegations appears possibly to have been at least partially predicated upon statistics recited in footnote 2 of its opinion. Petitioners were never afforded an opportunity to rebut the statistical figures set forth in footnote 2. No statistics were offered by plaintiff at the time of the District Court class action determinations. Minority representation statistics were offered at trial but not received until after the close of trial. Given the opportunity, appellees would seek to demonstrate from U. S. census figures that blacks comprise only 1.6% of the available general workforce in the Minneapolis-St. Paul Standard Metropolitan Statistical Area, 0.9% of the State of Minnesota and 1.6% of the surrounding five-state area at the time Marceline Donaldson worked for Pillsbury. Hence, the 2.5% figure is not at all a "low number" of blacks in Pillsbury's workforce.

[10] It must be noted that the employee and employment diversity inherent in the headquarters of a major national corporation is far removed from the types of differences which may exist between job grades 10 and 12 at a unionized production plant. A class suit encompassing the former will require analysis of numerous relevant labor markets and skills (engineers, lawyers accountants, business executives, secretaries, personnel specialists and research specialists with advanced degrees) with no promise that analytical conclusions in one field will shed light on the practice of another.



(5th Cir., 1974); *Reed v. Arlington Hotel Company*, 476 F. 2d 721 (8th Cir., 1973). The rationale for such decisions is that the Rule 23 objective of achieving efficiency through consolidation of overlapping claims can be achieved if there exists a substantial identity between the sources of employment actions challenged by several persons.

It is the existence of a common origin of employment decisions that is essential to effective use of a class action, not the existence of similar-sounding conclusory claims of denial of promotion, wrongful discharge, refusal to hire or the like. Focusing upon the latter rather than the former, the Court of Appeals has opened the door to abuse of the class action mechanism.[11] Claims requiring examination of facts and issues completely distinct from those called into question by the class representative's complaints can be thrust upon the District Court en masse. The equivalent of separate trials will be necessary. There can be no certainty that all potential claims have been identified by the single representative, although all Title VII rights of all class members potentially will be the subject of binding adjudication.

The mere fact that the complaints of a number of people are "rooted in the same bias" (against blacks, against females or whomever) provides no assurance that a single trial can achieve any economy in the consideration and resolution of those complaints. To the extent that employment policies and practices emanate from different policymakers acting

[11] This reliance on allegations and the inevitable framing of overbroad classes resulting from such reliance not only impacts on the proper administration of Rule 23, but also, through inclusion of claims not within the reasonable scope of a particular EEOC jurisdictional charge, undermines the investigation and conciliation functions of the Equal Employment Opportunity Commission. The EEOC charge is, of course, essential to federal court jurisdiction under the enforcement mechanism provided by Title VII, 42 USC §2000e-5.

upon isolated authority,[12] persons challenging those policies or practices do not genuinely have "similar grievances" which can be intelligently litigated in consolidated fashion.

The mandated concentration on allegations of discrimination as the lodestar determining the proper scope of Title VII class actions not only undermines the effective utilization of Rule 23 but also presents serious due process questions concerning the rights of absent class members. This very result was predicted by Judge Godbold in his specially concurring opinion in *Johnson v. Georgia Highway Express*, 417 F. 2d 1112 at 1126 (5th Cir. 1969).

> ". . . [W]hat may be most significant, an over-broad framing of the class may be so unfair to the absent members as to approach, if not amount to, deprivation of due process. Envision the hypothetical attorney with a single client, filing a class action to halt all racial discrimination in all the numerous plants and facilities of one of America's mammoth corporations. One act, or a few acts, at one or a few places, can be charged to be part of a practice or policy quickening an injunction against all racial discrimination by the employer at all places. It is tidy, convenient for the courts fearing a flood of Title VII cases, and dandy for the employees if their champion wins. But what of the catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class?"

The undue emphasis placed upon the role of pleadings containing the same "legal or remedial theories" combined with the natural desire to avoid what appears on the *face* of the

[12] See footnote 7.



pleadings to be duplicitous lawsuits can only result in district courts creating classes which in essence are ". . . so diverse and unmanageable that the effect of unlawful discrimination cannot be separated from other pausible but not demonstrably unlawful causes of members reduced earnings." *U.S. v. U.S. Steel Corp.*, 520 F.2d 1043 (5th Cir., 1975) at 1050-1051.

Petitioners respectfully submit that Title VII class actions, encumbered as they are with enormous factual complexity and sobering dispositive effect upon innumerable individual claims, must be structured and managed with greater care than that engendered by simple comparison of conclusory allegations by a Court of Appeals. It is accordingly imperative that this Court seize the present opportunity to rule that the employer's company structure and system of policy dissemination and implementation must be analyzed in conjunction with the nature of the claims advanced to assure that claims subsumed within a certified class will not be overlooked and that litigation will not proliferate to basic controversies and issues not at all drawn into question by the class representative's personal claims. Unless greater significance is attached to the Rule 23(a) class action prerequisites, the serious possibility of Title VII jurisdictional defects will be raised and District Courts will be shackled to the inflexible proposition that a Title VII class is as large as any single plaintiff artfully says it is. If the District Court's function is merely to test the breadth of the class allegations against the breadth of the class sought, its discretion to find facts and to manage fair, efficient and thorough adjudication of controversies before it is illusory.

**3. By setting aside the District Court's Order dismissing the complaint of Marceline Donaldson after trial, solely on the grounds of the District Court's handling of statistical evidence and evidence relating to the independent personal complaints of non-party Pillsbury employees, the Court of Appeals acted in a manner which is inconsistent with this Court's decisions in McDonnell Douglas v. Green and International Brotherhood of Teamsters v. United States.**

In *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) this Court prescribed the order of proof for individual employment discrimination cases involving an employer's refusal to rehire. That decision, as amplified recently in *International Brotherhood of Teamsters v. United States*, —— U.S. ——, 97 S. Ct. 1843, L. Ed. 2d ——, (1977), clarifies the important role which employment statistics and corroborative collateral testimony may play in both the establishment of a prima facie case and the demonstration of pretextual company reasons by a Title VII plaintiff. This Court also cautioned, however, that statistics "while helpful, may not be in and of themselves controlling as to an individualized hiring decision, *particularly in the presence of an otherwise justifiable reason for refusing to rehire.*" (Emphasis added) *Green, supra*, 36 L. Ed. 2d at 679, footnote 19.

In *Teamsters*, this Court reiterated:

> "We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." 97 S. Ct. at ——.



Notwithstanding these clear admonitions, the Court of Appeals ruled, by a two to one decision, that despite the elaborate explicit findings by the District Court of justifiable nondiscriminatory reasons for company actions toward Donaldson —which findings were not disturbed by the Court of Appeals—further trial proceedings relative to Donaldson's claims were necessary solely for the purpose of further entertainment of statistical and collateral third party testimony evidence. But Donaldson's claims were not dismissed by the District Court for want of a prima facie showing, nor was the possibility of pretext overlooked. The trial proceeded with Pillsbury accepting the burden of coming forward to specifically prove what happened to Donaldson and why. The issues thereupon raised were concrete and specific to Donaldson and her co-workers. Under such circumstances, the District Court ruled, disjunctive testimony of the unrelated experiences of others and general inferences which might be drawn from overall statistical evidence became remote and unpersuasive relative to Donaldson's particular claims.

The District Court's findings were specific to plaintiff's personal claims and founded upon direct evidence pertinent to those claims. Donaldson claimed her office, telephone and secretarial arrangements were inferior. The District Court examined her arrangements and those of white male counterparts and found hers to be fair in relation to fellow employees. Donaldson claimed her pay was low relative to white males comparably positioned; the District Court looked at the salaries involved and found hers to be fair, reciting specific examples. The District Court further heard all evidence offered by all parties on the subject of Donaldson's discharge. It concluded that her discharge was justified on the basis of her

demonstrated record of tardiness and absenteeism, her disobedience of her supervisor (citing a specific incident), her insubordinate and uncooperative work attitude and her superficial performance of work assignments, notwithstanding fair and adequate supervision, training, guidance and understandable work direction, as partially reflected in written job descriptions and clear short-term and mid-term job assignments received in evidence. The possibility of pretextual reasons for the company's treatment of Donaldson was thus confronted and eliminated to the satisfaction of the District Court.

The District Court concluded its Final Memorandum and Order by expressly stating that it had considered all tendered statistical evidence and all offers of proof, prepared by plaintiff, as to available collateral testimony of third party witnesses (who could testify not as to Donaldson but only as to their own separate experiences with Pillsbury organizations and supervisors distinct from those applicable to Donaldson) and that it found such evidence unpersuasive and insufficient to alter its findings and conclusions that the company's reasons for treating Donaldson as it did were justifiable.

The Court of Appeals, over the dissent of Judge Ross, disregarded the Chief District Judge's statement that he had considered the latter evidence and ordered remand for further consideration of that evidence. Under the circumstances, no positive benefit or purpose can be served by remand of Donaldson's individual case. Remand proceedings will not amplify the record in Donaldson's behalf but will merely serve to incorporate Pillsbury's cross-examination and rebuttal of the subject evidence.

The Court of Appeals stated that its action carried "the concomitant benefit of re-enforcing the right of the class to fair and adequate representation by preserving (Donaldson's) personal stake in the outcome of the case." Fairly viewed, the Court's action reversing the dismissal of Donaldson's claims can only be construed as a tortured and absolutely unfounded attempt to allay the Court's well-placed concern for the adequacy of class representation in subsequent District Court class proceedings. This action, particularly insofar as it is premised upon an ungrounded disrespect for the District Court's description of what evidence it had already considered, departs so radically from accepted judicial processes and legal authority as to warrant, if not compel, corrective action by this Court.



**4. The trial of a major Title VII class action involving a plaintiff class represented only by a person previously determined not to be a member of the class would contravene this Court's ruling in Rodriquez.**

There exists substantial well-reasoned authority to the effect that the defeat of a class representative's claims at trial will not simultaneously defeat all class claims. The situation is markedly different, however, when prior to the trial of class claims, and even prior to class certification, the individual claims of the sole purported class representative are dismissed on the merits in conjunction with an express finding that that potential representative lacks credibility as a witness. Under such circumstances, the Rule 23(a)(4) requirement of adequate representation inherently fails to be satisfied.

In *East Texas Motor Freight System, Inc. v. Rodriquez*, —— U.S. ——, 97 S.Ct. 1891, —— L. Ed. 2d ——, (1977) this Court recently unanimously ruled that the District Court did not err in denying individual relief and that persons who were not themselves victims of discrimination were not members

of the class of discriminatees they purported to represent and therefore were not adequate class representatives. Identical logic would compel a similar result in the instant case, should this court see fit to review the Court of Appeals' disposition of Donaldson's individual claims and to order reinstatement of the District Court's judgment of dismissal.

## CONCLUSION

An explication by this Court of the requisites of class certification in Title VII cases is much needed and central to the administration and resolution of a body of cases which comprise a major component of the demand upon the resources of the federal judiciary at the present time. Delineation of what "careful attention" should be accorded Rule 23 in this context, and clarification that mere comparison of allegations with class ambitions is insufficient foundation for class certification, especially at the Court of Appeals level in the first instance, would greatly ease the burden upon District Courts and Title VII litigants as they attempt to intelligently resolve reasonably defined Title VII controversies.



The apparent attempt by the Court of Appeals to skirt serious class representation issues by artificially resuscitating Donaldson's individual claims is completely unjustified. It attributes undue compulsory weight and significance to statistical and remote collateral evidence. The Court of Appeals decision further constitutes a precedent which seriously jeopardizes the deference and respect to which District Court findings should be entitled. Accordingly, this aspect of the case also warrants consideration by this Court.

Respectfully submitted,

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## APPENDIX


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# APPENDIX

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## UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No. 76-1288

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Marceline M. Donaldson and others similarly situated,
*Appellant,*

v.

The Pillsbury Company; William H. Spoor; L. D. Compton; Douglas J. Dennett; Harry Funk; Henry A. Brown and C. Dean McNeal,
*Appellees.*

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Appeal from the United States District Court for the District of Minnesota.

---

Submitted: September 24, 1976
Filed: April 14, 1977
Before BRIGHT, ROSS and WEBSTER, Circuit Judges.

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WEBSTER, Circuit Judge.

Marceline Donaldson, a black woman, appeals from a judgment in favor of the defendants, The Pillsbury Company and certain of its employees, in her employment discrimination action. Appellant contends that the District Court erred both in refusing to certify her suit as a class action, and in ruling on certain discovery and evidentiary matters in the trial of her individual claim.

Appellant was employed by Pillsbury at its Twin Cities headquarters in Minneapolis-St. Paul, Minnesota, from February 1, 1972, to January 31, 1973. She originally held a management position in the Personnel Department. In September, 1972, she was transferred at her request to a position in the International Operations Division. Some time thereafter, her supervisors became dissatisfied with her work in International, and in December or January, 1973, the decision to discharge her was made.

Appellant's amended complaint alleged numerous acts of discrimination against her. She contended that, in her job in Personnel, she was not originally provided a job title or description; that the job provided for her in International was below that for which the she was qualified; that various individuals withheld from her the standards, guidance, and training necessary to job performance; that her working place, telephone arrangements, and secretarial arrangements in International were inferior to those provided to others in similar positions; that Pillsbury did not provide educational aid so that she could take Spanish courses; that her attempts to eliminate discrimination against herself and other employees were rebuffed; that she was not furnished with objective evaluations; that she was not paid the same compensation as white males in similar positions; and that she was discharged on the basis of her race and her sex, and her opposition to Pillsbury's discriminatory practices.

In the complaint, appellant sought to represent a class composed of all black and female persons who are or were employed by Pillsbury at its Twin City headquarters, and all black and female persons who have been denied such employment on account of race or sex. Such class would, of course, be circumscribed by the effective dates of the jurisdictional statutes



and the applicable statutes of limitations.[1] She alleged that Pillsbury's general employment practices were discriminatory in many respects, particularly that the company maintained separate hiring offices for men and women, engaged in word of mouth recruitment, paid lower wages to females and minority group males, placed such persons into positions below those for which they were qualified, failed to furnish objective evaluations, promoted whites rather than blacks with more seniority, used unreliable testing instruments, excluded women and blacks from company-sponsored educational programs, harassed those who opposed unlawful employment practices, and withheld training and guidance from black and female employees.

After filing the amended complaint, appellant moved to certify the action as a class action under Fed. R. Civ. P. 23. On September 15, 1975, the District Court denied this motion. In doing so, the Court relied principally on the typicality requirement of Rule 23(a)(3). The Court said:

> Plaintiff's claims are unique to herself and not typical or representative of the classes she seeks to represent. She was especially hired outside the normal channels to do a special kind of work. She claims personal mistreatment relating to inadequate training and discharge and personal complaints about having a secretary, individual office or telephone. She also attacks Pillsbury's personnel policies as being discriminatory.
>
> Plaintiff personally well may have a good cause of action and Pillsbury's personnel policies well may be subject

[1] Appellant seeks relief under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. §1981. The District Court, in its order denying class action status, set the threshold date as "since 1965." *See* note 6, *infra*.

to attack, but this plaintiff is not an appropriate representative for the class because the requisites of Rule 23 (a)(3), requiring typicality of claims, is not satisfied. It is also questionable whether the other requisites, numerosity, commonality of issues and adequacy of representation, are met, but it is very clear to me that Marceline Donaldson would not be an appropriate person under the standards set in Rule 23 to represent all Blacks and all women whom she seeks to represent.

Appellant filed a motion to reconsider the denial of class standing. This motion was denied; an appeal from the denial was dismissed by this Court for lack of jurisdiction. *Donaldson v. The Pillsbury Co.*, 529 F.2d 979 (8th Cir. 1976).

Appellant conducted extensive pretrial discovery. Her attorneys undertook a statistical analysis of Pillsbury's employment practices. In response to a first round of interrogatories and motions for production of documents, Pillsbury allowed her attorneys access to many documents, including employment applications and personnel files. Pillsbury also produced computer printouts containing a good deal of information relating to the characteristics of Pillsbury's labor force.

Appellant's attorneys contended that this information was not sufficient for their purposes. They filed a second round of interrogatories, requesting detailed information about the files maintained in Pillsbury's electronic data processing system. The purpose of these interrogatories was to enable the attorneys to file requests for production of magnetic tapes containing the data stored in certain of Pillsbury's computer files, so that appellant's experts could perform their own computer analysis of the data. Pillsbury, in response to interrogatories, replied that it would be "literally impossible to provide the information requested" because "between 500 and 2,000 different file and report formats exist." Appellant then



moved to compel answer to these interrogatories. A U.S. Magistrate, to whom the matter had been referred by the District Court, denied the motion to compel answers, finding that the interrogatories "have been asked in other ways and have been answered." The District Court, on motion to reconsider this order, denied discovery of the computer information.

There followed a lengthy trial. Appellant was her own principal witness. She testified to what she believed were numerous instances of discrimination against her. When she first was assigned to Personnel, she was not given a job description. In Personnel, her principal function became resolving the complaints of female and minority employees. She encountered resistance within the company in her attempts to do so. She received no performance review while in Personnel. On her transfer to International, she was assigned to a secretary's desk rather than the office she had been promised. Her telephone arrangements were unsatisfactory. (These were corrected, after appellant's complaint in October.) She testified that she was unjustly accused of making errors in her work. Much of the work assigned to her was of a clerical nature, or was "makework." When she was assigned markets to handle, the necessary files were in the hands of another employee, so that she was unable to handle them. She testified that her supervisor made sexual advances to her. Finally, appellant was terminated.

As part of her case, appellant made an offer of proof of testimony of fifteen minority employees who contended that they had been victims of discrimination at Pillsbury and who had spoken with appellant about their problems. The District Court at time of trial declined to admit this evidence, finding it irrelevant. Appellant also submitted computer printouts and charts containing statistical information on Pillsbury's hiring

processes. The District Court admitted certain of these exhibits into evidence, but excluded others.

Pillsbury produced considerable evidence, including testimony by managerial personnel, contradicting appellant's claims of discrimination. L. D. Compton, an official in the International Division, testified that at no time had there been plans to provide appellant with office, telephone, and secretarial facilities inferior to those provided others at her level. In fact, she was provided with comparable facilities. Compton testified that appellant's performance on several projects was unsatisfactory, that she received numerous personal phone calls, and that she sometimes absented herself from the office without permission. He also testified that one of the assignments characterized by appellant as "makework" was in fact a training exercise, designed to give appellant knowledge of the problems of exporting consumer products, a knowledge essential to her job performance.

On February 6, 1976, the District Court entered a memorandum and order finding for the defendants on the merits. It found appellant to be "not a credible witness," and found the contested factual issues in favor of the defendants. With respect to the contested evidentiary matters, the Court said:

> During trial the court sustained objections to plaintiff's tender in evidence of many statistical exhibits, including Ex. 1-849, Ex. 1-850, Ex. 1-881 and Ex. 1-882 and offers of proof as to the testimony of many Pillsbury employees as being irrelevant. It still does not appear that such offered evidence is relevant but all of such statistical exhibits are now received, and even considering such exhibits and the offered evidence of the other Pillsbury employees, the court's finding and conclusion remain the same.

This appeal followed.



## I

In her complaint appellant sought, on the basis of her own claims of racial and sex discrimination, to pursue a broad-based attack on Pillsbury's employment patterns and practices that in her view invidiously discriminated against black and female employees. The District Court took a different view and not only rejected her claim to class status, but also severely limited the scope of discovery and evidence as it applied to the trial of her own claim.

The District Court found that the claims of appellant were not typical of the claims of those in the class she sought to represent. While it described as "questionable" the extent to which appellant had satisfied Rule 23's requirements of numerosity, commonality of issues, and adequacy of representation, it is clear that its ruling stemmed from its conclusion that appellant's claim were "unique to herself and not typical or representative of the classes she seeks to represent." In so holding, we think the District Court misapprehended the scope and application of the typicality requirement and thereby abused its discretion in refusing to certify the case as a class action.

Rule 23(a) establishes these prerequisites to maintenance of a class action:

> (1) the class is so numerous that joinder of all members is impracticable,
>
> (2) there are questions of law or fact common to the class,
>
> (3) the claims or defenses of the representative parties are typical of the claims of defenses of the class, and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

We address ourselves to the third, or "typicality" requirement, since that is the only certain basis upon which the District Court denied class status.

Many courts have noted that the purpose of the typicality requirement overlaps with those of the other subsections of Rule 23(a). A few courts have equated "typicality" with the existence of the common questions required by Rule 23(a)(2). *Rakes v. Coleman*, 318 F. Supp. 181, 190 (E.D. Va. 1970); *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559, 566 (D. Minn. 1938); *see* 3B J. Moore, Federal Practice ¶ 23.062 (2d ed. 1972). *Contra, Vernon J. Rockler and Co. v. Graphic Enterprises, Inc.*, 52 F.R.D. 335, 343 n.14 (D. Minn. 1971).

More often, courts have equated typicality with the adequacy of the class representative or the absence of conflict of interest between the representative and class members, the interests protected by Rule 23(a)(4). *See, e.g., Windham v. American Brands, Inc.*, 68 F.R.D. 641, 649 (D.S.C. 1975), *rev'd on other grounds*, 539 F.2d 1016 (4th Cir. 1976); *Kinsey v. Legg, Mason & Co.*, 60 F.R.D. 91, 99 (D.D.C. 1973); *Cannon v. Texas Gulf Sulphur Co.*, 47 F.R.D. 60, 63 (S.D.N.Y. 1969); *Vernon J. Rockler and Co. v. Graphic Enterprises, Inc., supra.* Because of the existence of these lines of cases, Professor Moore suggests that, "In fact, there is no need for [Rule 23(a)(3)], since all meanings attributable to it duplicate requirements prescribed by other provisions in Rule 23." 3B J. Moore, Federal Practice ¶ 23.06-2 (2d ed. 1972). *See also* 7C Wright & A. Miller, Federal Practice and Procedure §1764 (1972).

In an effort to give Rule 23(a)(3) an independent meaning, some courts have said that the typicality provision requires a demonstration that there are other members of the class who have the same or similar grievances as the plaintiff. *Taylor*



*v. Safeway Stores, Inc.*, 524 F.2d 263, 268-71 (10th Cir. 1975); *Green v. Cauthen*, 379 F. Supp. 361, 372 (D.S.C. 1974); *White v. Gates Rubber Co.*, 53 F.R.D. 412, 415 (D. Colo. 1971); *see Green v. Missouri Pacific R.R. Co.*, 62 F.R.D. 434, 436 (E.D. Mo. 1973), *rev'd on other grounds*, 523 F.2d 1290, 1299 (8th Cir. 1975). This requirement was adopted as the law of this Circuit in *Wright v. Stone Container Corp.*, 524 F.2d 1058 (8th Cir. 1975). There, a black Title VII plaintiff claimed that his employer improperly excluded him from its maintenance department. This Court upheld the District Court's denial of certification, relying in part on the plaintiff's failure, under Rule 23(a)(3), to "identify any person who had been subjected to the same or similar treatment as he allegedly suffered." 524 P.2d at 1062.

Appellant's complaint alleges that Pillsbury has engaged in employment practices which have had the effect of limiting job opportunities of women and blacks. Statistical evidence was offered to show that Pillsbury has consistently employed a low number of women and blacks in its Twin Cities headquarters since 1965, and that of those minority groups actually employed, there has been a significantly high turnover.[2]

---

[2] From 1966 through 1972 (the last year for which this data is included in the present record), black employees did not exceed 2.5% of Pillsbury's headquarters work force. The largest number of blacks in any one year was thirty-four (out of 1,367 employees) in 1971. There were at most three blacks among 302 officers and managers (1% of workers in this category), and thirteen blacks among 410 professionals (3.1% of this category).

The total number of women employees was more representative exceeding 40% each year, with the largest number 823. However, there were at most eleven female officers and managers (3.6% of this category) and seventy-six female professionals (18.5% of this category). Female workers were disproportionately grouped in the "office and clerical" category.

Appellant alleged in her complaint that, although the number of minority employees had increased from thirteen in 1966 to forty in 1972, none of the original thirteen still worked for Pillsbury. Sixteen blacks terminated employment in 1972; twenty-two terminated in 1973. One hundred sixty-eight women terminated in 1972; 167 in 1973.

Among the discriminatory patterns alleged to have contributed to this condition are the following:

(a) disparity in employment at upper levels, particularly professional and management jobs,

(b) disparity in pay between white males and females and blacks for equivalent work,

(c) separate hiring offices (until January, 1973) for men and women with job limitations on women not applicable to men,

(d) the denial to blacks and females of jobs with meaningful content or regular defined duties.

(e) the denial to blacks and females of opportunities for advancement into higher level positions comparable to similar opportunities available to white males,

(f) evaluations by biased supervisors,

(g) unequal working conditions for comparable jobs,

(h) unequal monitoring of infractions of company rules and regulations, and

(i) retaliation against employees who protested against discriminatory practices.

To support these allegations of pervasive discriminatory conduct, appellant produced affidavits by employees of Pillsbury who claimed to have been the victims of race or sex bias in one or more of the forms listed.[3] Appellant's allegations

[3] Appellant produced six affidavits: four of black females, one of a black male, and one of a white female. Five of the affiants had been employed at Pillsbury. All made numerous claims of discrimination. One affiant complained of the unavailability of a professional or managerial job, two of inequality in pay, two of the denial of jobs of meaningful content or well-defined duties, three of the denial of advancement opportunities, four of bias on the part of supervisors, one of inequality in working conditions, and one of retaliation for protesting discrimination. One of the affiants, a black woman, had never been hired by Pillsbury. She applied for a managerial or professional position in January, 1973, and asserts she was told that Pillsbury did not employ women in such positions.



of employment discrimination, while factually differing in detail from those of other employees as reflected in their affidavits, are plainly rooted in the same bias asserted as the source of the discrimination. Appellant may properly challenge such practices.

In *Wright v. Stone Container Corp., supra,* 524 F.2d at 1061-62, we said:

> We are committed to the proposition that Rule 23 should be liberally construed to effectuate the remedial policy of Title VII since the conduct therein proscribed is discrimination against a class characteristic.

The District Court stressed the unique aspects of appellant's employment—that "[s]he was specially hired outside the normal channels to do a special kind of work." While this finding is questionable, if not clearly erroneous,[4] it is not enough

In addition to the affidavits, appellant, in her own deposition, identified eighteen other individuals who claimed to be victims of discriminatory policies.

These affidavits were presented in support of the motion to reconsider the denial of class certification, rather than in support of the initial motion for certification. It is not clear why they were not presented in support of the original motion. The affidavits were filed, however, a short time after the order denying certification, when no prejudice to Pillsbury would have resulted from reconsidering the question. Reconsideration was permissible at any time. Fed. R. Civ. P. 23(c). In determining whether the District Court at any time abused its discretion in refusing to allow certification, we consider the affidavits as going to the question of typicality.

[4] Appellant did come to Pillsbury in an unusual fashion, in that her first contact was with Dean McNeal, a company vice-president, whom she met through the Minneapolis Urban Coalition. McNeal directed her to Henry Brown, of the Personnel Department, and she went through what is apparently the standard interviewing procedure.

Her duties, first in the Personnel Department and then in the International Division, were not a "special kind of work"; they appear to be activities regularly carried on by many Pillsbury employees. Appellant's position was "special" only in that she entered the company at a level higher than that of most Pillsbury employees of her race and sex.

to make appellant's claims atypical. *See Long v. Sapp*, 502 F.2d 34, 43 (5th Cir. 1974) (plaintiff could represent class challenging county hiring practices even though she herself had been hired). She has charged discrimination based on patterns and practices not special or unique to herself and has made a showing that a significant number of other members of the class have been similarly victimized by the same patterns and practices. When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment. *Gibson v. Local 40, Longshoremen's Union*, 543 F.2d 1259, 1264 (9th Cir. 1976); *Senter v. General Motors Corp.*, 532 F.2d 511, 523-24 (6th Cir. 1976); *Russell v. American Tobacco Co.*, 528 F.2d 357, 365 (4th Cir. 1975), *cert. denied*, 425 U.S 935 (1976); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 340 (10th Cir. 1975); *Long v. Sapp, supra*, 502 F.2d at 43.

By demonstrating that there were in fact other members of the class who had similar grievances, *Wright v. Stone Container Corp., supra*, appellant has met the quantitative aspect of the typicality requirement. Our analysis of appellant's individual claims likewise convinces us that her personal interest in establishing the various claims of discrimination is sufficiently parallel to the interests of the other class members to assure a vigorous representation of the class.[5] She has laid

[5] The class obviously is one in which the numerosity requirement has been met. *See* Rule 23(a)(1). The allegations of class-based discrimination in hiring and employment practices likewise satisfy the Rule 23(a)(2) requirement of commonality. Finally, it is clear from this record that appellant can fairly and adequately protect the interests of the class. *See* Rule 23(a)(4). In fact, she is uniquely qualified by reason of her extensive experience dealing with minority problems within Pillsbury, and her chosen counsel has demonstrated full competence to press her claims in court.



a proper foundation to pursue a full-scale inquiry into Pillsbury's alleged unlawful practices. *See Reed v. Arlington Hotel Co.*, 476 F.2d 721, 723 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 425 (8th Cir. 1970). We therefore conclude that the District Court abused its discretion in denying class status.[6]

II.

Appellant claims that she was erroneously denied needed statistical evidence by the orders of the District Court relating to discovery. In order to present her pattern and practices claim, she sought to obtain a computer readout or tape which would disclose the employees at Pillsbury headquarters during the applicable period by name, race, sex, job and pay. Appellee contends that this information had already been furnished to appellant in the form of a massive production of records from which the desired information could be synthesized. We have been given sharply conflicting statements of the cost and feasibility of producing this information from Pillsbury's com-

Appellant's failure to prevail on her own claim, while ordinarily an element to consider in the appellate review of a class action determination, *see Wright v. Stone Container Corp., supra*, 524 F.2d at 1062, is not conclusive. It does not defeat her capacity to represent the class. *See Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 428 (8th Cir. 1970); *Roberts v. Union Co.*, 487 F.2d 387, 389 (6th Cir. 1973); *Martin v. Thompson Tractor Co.*, 486 F.2d 510, 512 (5th Cir. 1973); *Moss v. Lane Co., Inc.*, 471 F.2d 853, 855 (4th Cir. 1973); *Brown v. Gatson County Dyeing Machine Co.*, 457 F.2d 1377, 1380 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972). In this case, where the representative's failure on the merits might have resulted from the District Court's improper limitation of the scope of her proof (*see* Part III, *infra*), we accord this element little weight.

[6] We have accorded the District Court a degree of discretion to limit a class where only a specific employment practice applicable to a limited number of employees is challenged. *Green v. Missouri Pacific R.R. Co.*, 523 F.2d 1290, 1299 (8th Cir. 1975). The allegations here appear to be as broad as the class claimed. The District Court retains the power to designate sub-classes or decertify the class upon a proper showing as the case progresses.

puter bank.[7]

The information relating to past salaries was undeniably relevant, even in an individual case, for an employer's past history is relevant in such a case both to show disparate treatment and to establish a claim of pretextuality. *King v. Yellow Freight System, Inc.*, 523 F.2d 879 (8th Cir. 1975); *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300, 305 (5th Cir. 1973). *See also Parham v. Southwestern Bell Telephone Co., supra.* Data in computer-readable form is more easily subjected to analysis, and two district courts have upheld motions for production of such documents, in the face of claims that similar information had been provided in readout form. *Adams v. Dan River Mills, Inc.*, 54 F.R.D. 220, 222 (W.D. Va. 1972) (employment discrimination case); *United States v. Davey*, 404 F. Supp. 1283 (S.D.N.Y. 1975) (tax case).

Because we conclude that the District Court erred in excluding the statistical evidence which was produced, as well as certain other evidence (*see* Part III, *infra*), we need not decide whether the Court abused its discretion in refusing discovery of material in Pillsbury's data base in computer-readable form. On remand, the District Court may, of course, reconsider the question, particularly in light of our determination that the suit should proceed as a class action.

III

Despite the limitations on discovery, appellant was able to

[7] Appellant's expert stated by affidavit that the actual process of duplicating computer tapes involved a minimum of expense (the greatest part of which is fifteen dollars for the tape itself). He asserted that in a case involving a large number of employees use of data in computer-readable form is the most economical method of preparing statistical data for court use. Appellees contended, in responding to interrogatories seeking information in computer-readable form, that even certain preliminary information deemed necessary by appellant could not be produced because "[b]etween 500 and 2,000 different file and report formats exist."



produce at trial a number of statistical exhibits relating to Pillsbury's past employment practices. The District Court excluded certain of the statistical exhibits, and all testimony of the other employees. Appellant made offers of proof of the excluded testimony. At the conclusion of its opinion on the merits, the District Court said of this evidence, "It still does not appear that such offered evidence is relevant but all of such statistical exhibits are now received, and even considering such exhibits and the offered evidence of the other Pillsbury employees, the court's finding and conclusion remain the same." Appellant contends that the District Court improperly excluded this relevant evidence.

In defending the District Court's ruling rejecting appellant's personal claims, Pillsbury contends that, assuming a prima facie case of discrimination could have been made by the excluded evidence, Pillsbury nonetheless had met its burden to supply bona fide reasons (other than discrimination) for appellant's discharge. It relies on the District Court's finding that the true reason for appellant's discharge lay in her performance: her habitual tardiness, unsatisfactory and superficial performance of work assignments, and the insubordinate and uncooperative work attitude in the International Division. The Court found that appellant saw "bogeymen" of discrimination where there were none.[8]

[8] The District Court concluded:

> I am satisfied from all of the evidence that plaintiff was not discriminated against in any respect. On the contrary, it shows that in many respects she was afforded preferential treatment. Most of plaintiff's proof came only from plaintiff herself. She was not a credible witness. The conclusion is fully justified from the evidence that plaintiff saw bogeymen where there were none and unjustifiably attached improper motives and racial and sex overtones to many events and relationships during the year of her employment with Pillsbury. Plaintiff had the enviable opportunity to learn much and advance rapidly with her employer but her work just didn't pass muster and this, with her negative attitude and contentious disposition, fully justified her discharge.

Pillsbury concedes that the use of statistical evidence and evidence of pattern discrimination may be useful to support an individual claim of race or sex discrimination. *Marquez v. Omaha District Sales Office, Ford Div. of Ford Motor Co.*, 440 F.2d 1157 (8th Cir. 1971); *see King v. Yellow Freight System, Inc.*, 523 F.2d 879, 882 (8th Cir. 1975). It argues, however, that proof of a satisfactory nondiscriminatory reason for discharge will overcome the effect of such statistical or pattern evidence. *See King v. Yellow Freight System, Inc., supra*; *Naraine v. Western Electric Co.*, 507 F.2d 590, 594 (8th Cir. 1974).

The difficulty with this argument is that the District Court, by excluding substantial relevant evidence of discriminatory patterns and practices by Pillsbury,[9] may well have so circumscribed the evidence that it robbed appellant's case of the setting necessary to give credibility to her personal claims of discrimination. It is not surprising under these circumstances that the District Court concluded that appellant saw bogeymen where there were none. While we are not prepared to say that the District Court's findings of fact are clearly erroneous on the record before it, we do hold that the District Court erred in excluding relevant evidence which might well have affected its findings. We do not think that the District Court's post-trial nunc pro tunc admission of the excluded evidence and offers of proof, and its summary rejection thereof, can operate to cure the prejudice to appellant in the presentation of her case.

[9] It is apparent that the District Court's rulings stem from a legitimate desire not to overburden the record and from the conclusion, here held to be erroneous, that appellant's claims were unique and both unlike and unrelated to the claims of other Pillsbury employees.



We deem it appropriate to vacate the judgment dismissing appellant's personal claims of discrimination in order that she might have the benefit of the additional evidence of patterns and practices which will be available to the entire class. This has the concomitant benefit of reinforcing the right of the class to fair and adequate representation by preserving appellant's personal stake in the outcome of the case. Since the case is to be tried to the Court, it will not be necessary to resubmit evidence which was admitted at time of trial. New evidence can be adduced in the form of a supplemented record. *See Rich v. Martin Marietta Corp., supra*, 522 F.2d at 347.

Reversed and remanded for further proceedings consistent with this opinion.

ROSS, Circuit Judge, Concurring in part and Dissenting in part.

I agree with the majority that the trial court should have permitted this action to proceed as a class action. I do not agree, however, with the determination that the trial court erred in dismissing appellant's individual claim. The specific findings as to credibility and as to the facts concerning the appellant's personal case are set forth at length in Judge Devitt's opinion, *Donaldson v. Pillsbury Co.*, 406 F.Supp. 1210 (D. Minn. 1976), and, in my opinion, are not clearly erroneous.

The majority suggests that appellant's claim be reconsidered in light of "relevant evidence of discriminatory patterns and practices by Pillsbury." But unless the trial court erred in some or all of its specific detailed findings of fact, the general statistical evidence will not change the fact that Pillsbury proved that it was fully justified in discharging the appellant for nondiscriminatory reasons. I do not agree that the fact that some evidence was admitted nunc pro tunc subsequent to trial is any indication that the trial court failed to

give it full consideration as it related to appellant's individual case.

I have serious reservations concerning the ability of the plaintiff to properly represent the class she seeks to represent in view of the fact that her own case was so completely without merit. However, I do agree that the failure of the class representative to prevail on her own claim does not necessarily disqualify her from representing the class.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.



UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1921

MARCELINE M. DONALDSON,

*Appellant,*

v.

THE PILLSBURY CO., ET AL,

*Appellee.*

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA.

Submitted: January, 22, 1976
Filed: February 5, 1976

Before LAY, HEANEY and ROSS.

PER CURIAM.

Plaintiff Donaldson, a black woman, alleges that her employer, Pillsbury, has committed various discriminatory acts against her and other black and female employees. On September 17, 1975, the district court denied plaintiff's motion for class certification, reserving the right to alter or amend, under Fed. R. Civ. P. 23(c)(1). On November 10, the district court denied plaintiff's motion to reconsider this order, and refused to certify the question for appeal under 28 U.S.C. § 1292(b). On November 12, notice appeal from the order of November 10 was filed. Defendants have moved to dismiss the appeal for

want of jurisdiction. The appeal must be dismissed because the order is not appealable.

Plaintiff asserts that the November 10 order refusing to reconsider the denial of class status is appealable under 28 U.S.C. § 1292(a)(1), as an interlocutory order refusing an injunction. Section 1292(a)(1) allows interlocutory appeals from orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . ." This exception to the final judgment rule was enacted because of "a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955). *See generally Stewart-Warner Corp. v. Westinghouse Electric Corp.*, 325 F.2d 822, 829-30 (2nd Cir. 1963) (Friendly, J., dissenting), *cert. denied*, 376 U.S. 944 (1964).

A number of circuits have extended the injunction exception to orders denying class certification, where injunctive relief is sought on behalf of the class. The rationale of these cases has been that, by refusing class status, the trial court has narrowed the scope of injunctive relief which can be obtained in the action. *Jenkins v. Blue Cross Mutual Hosp. Ins., Inc.*, 522 F.2d 1235 (7th Cir. 1975); *Jones v. Diamond*, 519 F.2d 1090 (5th Cir. 1975); *Price v. Lucky Stores, Inc.*, 501 F.2d 1177 (9th Cir. 1974); *Yaffe v. Powers*, 454 F.2d 1362 (1st Cir. 1972); *Brunson v. Board of Trustees*, 311 F.2d 107 (4th Cir. 1962). *Contra, Williams v. Mumford*, 511 F.2d 363 (D.C. Cir. 1975); *City of New York v. International Pipe and Ceramics Corp.*, 410 F.2d 295 (2nd Cir. 1969).

If plaintiff had appealed from the order denying class certification, we would have to decide whether to follow this line of cases and hear the appeal. However, she appeals only



the November 10 refusal to reconsider the denial of class status.[1] This order is plainly not appealable.

Appellant argues, in effect, that if the first refusal to certify is appealable under §1292(a)(1), then the subsequent refusal to reconsider is also appealable under that section. This argument is not well taken.

Hearing this appeal would not serve the purpose of the injunction exception. Courts extending the injunction exception to class certification orders recognize that this exception to the final judgment rule is a "narrow" one. *See Jones v. Diamond*, 519 F.2d 1090, 1095, n.7 (5th Cir. 1975). They extend the exception as far as they do only because they feel it is necessary to achieve the purpose behind § 1292(a)(1) allowing review of district court action having "serious, perhaps irreparable consequences." *Id.* at 1095-96. This reason for allowing an appeal is not present here. Plaintiff had every opportunity to avoid the serious, irreparable consequences of denial of class certification, by appealing from the original order denying certification, but she did not do so within the time allowed.

To hear this appeal would conflict with the purposes of the final judgment rule, because it would encourage piecemeal review. If plaintiff's argument were accepted, a party whose motion for class certification was denied could appeal the denial at any time, simply by moving for reconsideration in

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[1] The notice of appeal refers only to the November 10 refusal to reconsider; it does not purport to appeal the September 17 refusal to certify. Moreover, if this were treated as an appeal from the September 17 order, it would be untimely. The thirty day notice of appeal requirement of Fed. R. App. P. 4(a) applies to interlocutory orders appealable as of right. *See* 9 J. Moore, *Federal Practice* ¶ 110.21; *See also Dahlen v. Kramer Mach. and Eng. Prods. Co.*, 303 F.2d 293 (10th Cir. 1961); *Stiller v. Squeeze-a-Purse Corp.*, 251 F.2d 561 (6th Cir. 1958). Notice of appeal here was not filed within thirty days of the refusal to certify.

the district court, and appealing a denial of reconsideration. There is no compelling reason for so encouraging interlocutory appeals.

Neither the language nor the purpose of §1292(a)(1) makes this order appealable. To hear the appeal would conflict with the final judgment rule. Accordingly, we conclude that the district court's order is not the "refusing of an injunction", required by § 1292(a)(1), and is not appealable.

Defendant's motion is granted, and the appeal is dismissed.

The true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUT.



UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

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4-74-Civ-183

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MARCELINE M. DONALDSON,

*Plaintiff,*

vs.

THE PILLSBURY COMPANY, et al.,

*Defendants.*

---

MEMORANDUM & ORDER

---

Dolores C. Orey, St. Paul, Minnesota; Deborah Greenberg, New York, N.Y.; Percy L. Julian, Jr., Kenneth P. Casey, Daphne Webb, Madison, Wisconsin, attorneys for plaintiff.

Thomas P. Kane, Robert Reinhart, Jr., Oppenheimer, Wolff, Foster, Shepard and Donnelly, St. Paul, Minnesota, attorneys for defendant The Pillsbury Company and defendants William H. Spoor, L. D. Compton, Harry Funk, Henry A. Brown and C. Dean McNeal; James C. Noonan, St. Paul, Minnesota, attorney for defendant Douglas J. Dennett.

---

Plaintiff, a Black female, seeks compensatory and injunctive relief from defendant corporation and six of its officers under Civil Rights laws for claimed discriminatory treatment as an employee and for wrongful discharge based on race and sex.

Jurisdiction is properly based on 42 U.S.C. 2000e, *et seq.* and 42 U.S.C. 1985(3). The case was tried to the court for seven nonconsecutive trial days starting on January 6, 1976. Four-

teen witnesses testified and many exhibits were received. Briefs have been lodged and suggested findings of fact tendered. The court previously denied a request for class action certification.

In essence, plaintiff claims defendants discriminated against her on the basis of her race and sex by imposing discriminatory terms and conditions of employment upon her and by limiting her employment opportunities which adversely affected her status as an employee, and by discharging her in retaliation for her opposition to, and attempts to correct, discriminatory employment practices.

In essence, defendants deny discriminatory treatment or wrongful discharge of plaintiff and claim plaintiff was discharged because of poor job performance and bad work attitude.

Plaintiff worked for Pillsbury from February 1, 1972 to January 31, 1973. For about the first seven months she worked as a staff assistant in the Corporate Personnel Department with the title of Assistant Director of Manpower Planning. From early September on she worked in the Export Division of the International Operations Company as an Assistant to the Consumer Export Manager. Most of her complaints deal with her service in International.

Plaintiff, a native of Louisiana, came to Minnesota in 1961. She had extensive college training but had not earned a college degree. She had some work experience for others and for about three years conducted her own antique and interior decorating business. She was a registered representative for a stock brokerage firm for three years.

Marceline Donaldson was active in civic affairs in the Minneapolis community. She met C. Dean McNeal, a group vice-president of Pillsbury through work in the Minneapolis Urban



Coalition. She called him for assistance in obtaining work at Pillsbury. He helped her by arranging through Henry Brown, Personnel Manager, for an employment interview. She said she preferred work in the International Division. There was no opening there at the time but she was hired for work in the Personnel Department. Plaintiff had no previous qualifications for the work but was to be trained for her responsibilities.

The principal specific claims of plaintiff in support of her allegations of discrimination and wrongful discharge on account of race and sex are that she did not receive adequate training or supervision in her work, was not furnished meaningful job description of the work expected of her, did not receive compensation comparable to that received by others in similar occupations in Pillsbury, was not provided office, telephone and secretarial facilities equal to other employees similarly situated, was discouraged and obstructed in her assigned work of dealing with problems of minorities and women employees, was not afforded foreign language training to qualify her for work in the International Department and was wrongfully discharged because she was a Black and a woman.

Plaintiff, by her own testimony, supported these claims. There was preponderant evidence in refutation of each of these claims and in support of defendant's position that plaintiff was fairly and equally treated and was discharged solely because of poor job performance and bad work attitude.

While employed in the Personnel Department, plaintiff was provided education, supervision and continuing instruction as to her work responsibilities by Henry Brown, her supervisor. Her responsibility was to provide assistance in the recruitment and placement of qualified female and minority employ-

ment candidates and in the identification, communication and attempted resolution of employment problems of minority and female employees. Marceline Donaldson discharged these responsibilities at the specific request and with the full approval of her supervisors, Henry Brown and Harry Funk and with the strong encouragement of Pillsbury President Keith. The discharge of these responsibilities was not curbed or curtailed by her superiors.

Plaintiff received annual compensation of $15,000 which she stated was satisfactory and was fair and reasonable relative to compensation paid fellow employees. She was provided office, telephone and secretarial arrangements which were adequate and fair in relation to similar arrangements provided fellow employees in the Personnel Department.

Plaintiff was transferred to International about September 11, 1972 at her request and her pay was increased $1,000 to $16,000 per year. This was fair compensation relative to that paid to fellow employees. By way of comparison, William Conroy, Area Sales Manager with 25 years seniority, three college degrees and command of French and Spanish, received $17,000 per year. Her title was Assistant Sales and Marketing Administrator and the position was specifically created for her and was not filled when she was discharged.

The evidence shows that plaintiff received fair and adequate supervision, training and guidance in the Export Division. She was provided understandable work direction by her superiors, including the specific assignment to serve as assistant to Consumer Export Manager Douglas Dennett and in the development of Pillsbury's cooperative marketing program. She was afforded a written job description as well as clear short-term and mid-term job assignments.



Contrary to her claim, the evidence reflects that plaintiff was provided office, telephone and secretarial arrangements which were fair relative to similar arrangements provided fellow employees in International. Certain minor delays experienced in the completion of these arrangements were not unusual. Plaintiff persisted at trial that her office arrangements were inferior to those of others of a comparable status. But the evidence is clearly to the contrary. Plaintiff's office did not have an outside window but the evidence showed that was a luxury assigned to employees only after years of service.

Shortly after Marceline Donaldson moved to the Export Division, she asked to receive educational aid from Pillsbury to learn the Spanish language through the Berlitz program. Her repeated requests were refused by her superior for good reasons, including the preference of her supervisors that she address her initial learning efforts to learning the basic fundamentals of the international marketing business with which she had no prior exposure. Her immediate supervisors, Douglas Dennett and L. D. Compton, did not speak or write the Spanish language. Familiarity with Spanish was not a requirement for her work.

The evidence is clear, practically uncontradicted, that while employed in the Export Division, plaintiff was habitually tardy in reporting for work and was frequently absent from her work place without explanation. One of her superiors, Mr. Compton, said she "was not one day on time." Her work was distracted by a disproportionate number of personal telephone calls which did not abate despite the directives of her supervisors.

Work assignments delegated to plaintiff during the course of her employment with the Export Division were performed by her in unsatisfactory and superficial fashion. For example,

while her assignments included the research, planning and recommendation of corporate marketing opportunities whereby Pillsbury might utilize its existing foreign marketing organization to market new products of other domestic firms overseas, plaintiff's work in this regard failed to reflect research or planning efforts or analysis beyond the cursory idea stage.

Plaintiff persistently exhibited an insubordinate and uncooperative work attitude while employed in the Export Division. She resisted work direction from her supervisors, failed and refused to accept the necessity of learning the rudiments of international marketing, balked at attending to detail work which was critical to job performance at every level of employment in the Export Division and repeatedly engaged in contentious conduct which obstructed work efficiency within the department. It is not disputed that on November 14, 1972 plaintiff disobeyed the express direction of her superior, L. D. Compton, by devoting a full business day to participation in a program at Carlton College, Northfield, Minnesota, as a spokesman for Pillsbury, after Mr. Compton had discussed the matter at length with her and specifically refused her permission to be absent from work for this purpose. The evidence shows that plaintiff wanted to run her own show and was not amenable to suggestion or direction.

I am satisfied from all of the evidence that plaintiff was not discriminated against in any respect. On the contrary, it shows that in many respects she was afforded preferential treatment. Most of plaintiff's proof came only from plaintiff herself. She was not a credible witness. The conclusion is fully justified from the evidence that plaintiff saw bogeymen where there were none and unjustifiably attached improper motives and racial and sex overtones to many events and relationships



during the year of her employment with Pillsbury. Plaintiff had the enviable opportunity to learn much and advance rapidly with her employer but her work just didn't pass muster and this, with her negative attitude and contentious disposition, fully justified her discharge.

During trial the court sustained objections to plaintiff's tender in evidence of many statistical exhibits, including Ex. 1-849, Ex. 1-850, Ex. 1-881 and Ex. 1-882 and offers of proof as to the testimony of many Pillsbury employees as being irrelevant. It still does not appear that such offered evidence is relevant but all of such statistical exhibits are now received, and even considering such exhibits and the offered evidence of the other Pillsbury employees, the court's finding and conclusion remain the same.

These expressions shall serve as the court's Findings of Fact and Conclusions of Law in response to the dictate of Federal Civil Rule 52.

The Complaint is DISMISSED.

Dated: February 5, 1976.

EDWARD J. DEVITT
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

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4-74-Civil-183

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MARCELINE M. DONALDSON,
and others similarly situated,

*Plaintiffs,*

vs.

THE PILLSBURY COMPANY, et al.,

*Defendants.*

---

ORDER DENYING CLASS ACTION MOTION

Julian & Associates, S.C., Percy L. Julian, Jr., Kenneth P. Casey, Madison, Wisconsin; Dolores Orey, St. Paul, Minnesota; Jack Greenberg, James M. Nabrit, III, Morris J. Baller, Barry Goldstein, New York, N.Y., attorneys for plaintiffs.

Oppenheimer, Wolff, Foster, Shepard and Donnelly, Thomas P. Kane and Robert R. Reinhart, Jr., St. Paul, Minnesota, attorneys for defendants.

Plaintiff, a well educated Black woman who worked in executive capacities for defendant Pillsbury for twelve months in 1972-1973, seeks redress for her discharge claiming race and sex discrimination. She also seeks to represent a class of all Black and all female employees and all Black and all female persons denied employment by Pillsbury at its Twin Cities headquarters since July 1, 1965. For decision now is the propriety of certifying the requested class under Rule 23.

The Court has read the files, briefs, many of the cited cases



and the transcript of the hearing before the magistrate and is satisfied that plaintiff's motion for class action certification should be denied.

Plaintiff's claims are unique to herself and not typical or representative of the classes she seeks to represent. She was specially hired outside the normal channels to do a special kind of work. She claims personal mistreatment relating to inadequate training and discharge and personal complaints about not having a secretary, individual office or telephone. She also attacks Pillsbury's personnel policies as being discriminatory.

Plaintiff personally well may have a good cause of action and Pillsbury's personnel policies well may be subject to attack, but this plaintiff is not an appropriate representative for the class sought because the requisites of Rule 23(a)(3), requiring typicality of claims, is not satisfied. It is also questionable whether the other requisites, numerosity, commonality of issues and adequacy of representation, are met, but it is very clear to me that Marceline Donaldson would not be an appropriate person under the standards set in Rule 23 to represent all Blacks and all women whom she seeks to represent.

It is true as urged by plaintiff that under the Eighth Circuit decisions of *Reed v. Arlington Hotel Company,* 476 F.2d 721 (8th Cir. 1973) and *Parham v. Southwestern Bell Telephone Company,* 433 F.2d 421 (8th Cir. 1970), a discharged minority person *can* represent a class of minority applicants, and it is true a single charge of discrimination is sufficient to qualify one to represent others in the same class on all relevant issues, *Green v. Missouri Pacific Railroad Company,* No. 74-1849, July 23, 1975, but this is not to say that the requisites of Rule 23 do not have to be satisfied as a condition of class representation. The requirements of the Rule have not been met here.

The Court denies plaintiff's motion for certification and reserves the right to alter or amend this order as authorized by Rule 23(c)(1).

Dated: September 15, 1975.

EDWARD J. DEVITT
Chief Judge
United States District Court



UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1976
76-1288

MARCELINE M. DONALDSON, etc.,
*Appellant,*

vs.

THE PILLSBURY COMPANY, et al.,
*Appellees.*

Appeal from the United States District Court
for the District of Minnesota

The Court having considered petition for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

May 9, 1977.

Supreme Court, U. S.
FILED
AUG 12 1977
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-73

THE PILLSBURY COMPANY, *et al.*,
*Petitioners,*

v.

MARCELINE DONALDSON.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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THE PILLSBURY COMPANY, *et al.*,

*Petitioners,*

v.

MARCELINE DONALDSON.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## BRIEF FOR RESPONDENT IN OPPOSITION

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### Statement of the Case

This action was commenced on April 3, 1974, by respondent Marceline Donaldson, a black female former employee at the Pillsbury Company headquarters in Minneapolis, Minnesota. Plaintiff alleged that the company and six individual defendants engaged in discrimination against women and blacks in hiring, discharge, and terms and conditions of employment. The complaint alleged a class action on behalf of black and female employees and applicants at the headquarters, subject to the appropriate statute of limitations.

The defendants, petitioners here, opposed much of the discovery sought by plaintiff, and the district court "severely limited the scope of discovery." A-7. Petitioners'

response to plaintiff's first interrogatories failed to fully answer 35 questions out of 62 interrogatories. Respondent filed a motion to compel discovery, but the magistrate, after an *ex parte* conference with petitioners' counsel (Transcript of Proceedings, April 24, 1975, p. 10), summarily denied the motion without discussing the propriety of the particular disputed questions. App. 93a. In response to these interrogatories petitioners also furnished plaintiff with computer printouts of data on the company's headquarters workforce. The printouts proved largely unusable because they were incomplete, were internally inconsistent and contained no data on race prior to 1972, since the petitioners claimed that such data did not exist. Respondent sought production of petitioners' computer tapes in order to prepare her own printouts, but the magistrate summarily denied this request on September 9, 1975, on the ground that petitioners had already provided the needed information, an order which the district court upheld on October 30, 1975. The petitioners furnished significant additional statistical information, including the pre-1972 data previously claimed not to exist, on January 2, 1976, a year after it was requested and only four days prior to trial. The district court denied respondent's motion for a continuance, and directed the parties to proceed at once to trial.

On January 20, 1975, the district court first heard respondent's motion for class certification, but deferred ruling to permit additional discovery with regard to the class claim. On September 15, 1975, while respondent's motions to compel discovery remained unresolved and when transcripts of 14 of her witnesses had not yet been completed or filed, the district court reconsidered the class action motion and refused to certify the class. The sole reason relied upon by the district court was that respondent's claims were not typical of those of other women and blacks because she



"was specially hired outside normal channels to do a special kind of work." A-31.

The case was tried in January, 1976 over the objections of respondent. Because of a then pending interlocutory appeal, the 30 volume pre-trial record was in the office of the clerk of the Eighth Circuit from before the beginning of trial until the district court's decision of February 5, 1976. The district court ruled irrelevant respondent's evidence of systematic discrimination against women and blacks, and refused to permit testimony by 14 of the 15 class members called by respondent to show incidents of discrimination similar to that claimed by respondent. At the end of this somewhat unusual proceeding the district judge agreed to defer action until certain additional depositions could be taken and filed; seven days later, before those depositions could be filed, the district judge issued a Final Memorandum and Order dismissing respondent's claim.

On appeal the court of appeals reversed the denial of class certification as an abuse of discretion. It noted that respondent, though coming to the defendants' attention through the Minneapolis Urban Coalition, had been interviewed and selected in the normal manner, and differed from others of her race and sex only in that she had entered the company at a higher level, and was one of the few black women ever hired into a professional or managerial position. The court of appeals concluded that this distinction was legally irrelevant under Rule 23. The court of appeals also held that the district court had erred in excluding evidence of class wide discrimination on the basis of race and sex, and it remanded the respondent's individual claims so that they could be reconsidered in light of "the additional evidence of patterns and practices which will be available to the entire class." A-17. Because of this

disposition the court of appeals found it unnecessary to decide whether the district court's limitations on discovery were improper.

## Reasons for Denying a Writ

1. Petitioners seek review of the court of appeals' class action decision on a number of grounds. The questions actually presented by this case are somewhat different than those formulated in the petition.

Petitioners suggest that this case presents an issue expressly not reached by this Court in *East Texas Motor Freight System, Inc.* v. *Rodriguez,* 45 U.S.L.W. 4524 (1977), "whether a Court of Appeals should ever certify a class in the first instance." Petition, pp. 7-8. The question left open in *Rodriguez,* as the words "in the first instance" make clear, is whether a court of appeals should pass on the propriety of a class action *before* the issue has been presented to the district court. In *Rodriguez* no motion for certification had ever been made in the district court, which thus had no occasion to consider whether the requirements of Rule 23 were met. The company in *Rodriguez* urged that the proper role of an appellate court was to review the certification decision of the district court, not to resolve the Rule 23 issues *nisi prius.* This case presents no such issue. A motion for class certification was timely made and fully litigated in the district court; the district court relied upon only one ground for denying certification, and the court of appeals, having held that ground insufficient, properly concluded that certification should be ordered.[1] The procedure followed by the

[1] Although Rule 23 establishes a number of prerequisites to certification, petitioners in the court of appeals only questioned whether the necessary typicality was present. Nonetheless, the court of appeals, after finding typicality, reviewed the other requirements of the rule and found they were satisfied. A-12, n.5.



court of appeals here was the normal appellate practice, and it is difficult to imagine a more sensible alternative.[2]

The second issue posed by petitioners relating to the class is whether the court of appeals erred in approving the class "without definition or discussion merely by negative implication from two brief footnotes." Petition, p. 3.[3] Insofar as petitioners seek a review by this Court of whether an appellate court could decide a class action issue "without discussion", that question is simply not raised by this case; the Eighth Circuit opinion considers the class action issue at length. A-6 to A-13. With regard to the definition of the class, respondent sought to represent a class of all blacks and females who are or were employees at the Pillsbury headquarters or who had been denied employment on the basis of race or sex, subject to the applicable statutes of limitations; the district court noted no difficulty with this definition, and neither in their brief nor in their petition for rehearing in the court of appeals did petitioners suggest any alternative class definition.

Petitioners urge at length that the court of appeals erred in certifying the class "merely on the basis of allegations." Rule 23 establishes a number of prerequisites, some factual, others legal, to the maintenance of a class action. Rule 23(a)(3), with which petitioners are concerned, requires that the "claims" of the class representative be typical of the "claims" of the class. While other requirements, such

[2] Theoretically the court of appeals could have vacated the denial of certification and remanded for further proceedings consistent with its opinion, but the only consistent proceeding would be the granting of certification. Petitioners do not suggest that the authority of the appellate courts is limited to vacating a series of erroneous Rule 23 decisions in a single case until the errant trial court discovers the correct position.

[3] This issue, though encompassed within question (1)(b), is not pressed in petitioners' "Reasons for Granting the Writ."

as numerosity, require factual evidence, Rule 23(a)(3) deals with the relationship between the claims asserted by the representative and the claims asserted on behalf of the class.[4] Like the requirement that a complaint state a claim on which relief can be granted, the Rule 23(a)(3) requirement is literally a requirement about allegations, and an application of that rule cannot be overturned simply by denoting the allegations "mere". Plaintiff cannot be obligated, in order to obtain certification, to prove that both she and the class members were in fact victims of discrimination by Pillsbury, since such proof would be the equivalent of a trial on the merits. Even if some such proof were required, the extensive affidavits and offers of proof as to class discrimination which plaintiff offered in connection with her motion for reconsideration of the class action denial were sufficient to demonstrate the existence of class claims of discrimination on the basis of race and sex similar to her own claims.

Petitioners also argue that there are "uncontradicted affidavits" that the separate departments at Pillsbury "were and are independently managed" and that "the only common source of policy revealed on the record is the Board of Directors acting through its chairman". This contention is neither accurate nor relevant. Those affidavits were contradicted, and largely discredited, by depositions of petitioners' personnel officials;[5] and the affidavits were

[4] See, e.g. *Rakes* v. *Coleman*, 318 F.Supp. 181, 190 (E.D. Va. 1970); *American Airlines* v. *Transportation Workers Union*, 44 F.R.D. 47 (N.D. Okl. 1968).

[5] The various "companies" described in footnote 7 of the petition are not incorporated as such, and are generally denoted by Pillsbury and its staff as "divisions". App. 115a. These divisions are all located on adjacent floors of two physically connected office buildings in Minneapolis. App. 111a. All personnel activities in the divisions are supervised by a single headquarters personnel office, App. 1079a-80a, whose staff of 62 (as of 1974) administers



merely attached to a company brief in the district court, but never filed or made a part of the record and thus were not before the court of appeals. Rule 23, moreover, does not contemplate that a defendant can defeat a class action motion by arguing or seeking to prove that, even though all its foremen or personnel officials discriminated against blacks or women, each acted independently and the similarity of policy was mere coincidence. So long as Pillsbury is a legal entity these considerations are irrelevant for Rule 23 purposes; if the company's personnel officials, acting independently, in fact pursued different policies regarding minority or female employees, the defendants can establish that at the trial on the merits in order to limit any finding of liability to the departments where discrimination was practiced.

2. Petitioners contend that the court of appeals erred in vacating the dismissal of respondent's individual claims "without disturbing any of the District Court's extensive findings discrediting both the merit of Ms. Donaldson's complaints and her personal credibility." The court of appeals did not purport to substitute its own judgment for that of the district court on these issues, or to direct a finding in favor of respondent, but merely remanded the case to the district court so that the individual claim could be reconsidered in light of "the additional evidence of patterns and practices which will be available to the entire class." A-17. The court of appeals noted that the district court, after denying class certification, had "severely

policies set out in an 85 page personnel manual. P.Ex. 1-429; see Deposition of Henry Brown, April 14-15, May 5, 1975, pp. 18-20, 107-17, 214-34; Deposition of Graham Hatcher, May 16, 1975, pp. 4-10. There is also a single corporate Vice-President for affirmative action who sets goals and timetables for hiring for all the headquarters divisions.

limited the scope of discovery and evidence." A-7. This Court has repeatedly held that evidence of class wide discrimination is extremely relevant to an individual case. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 804 (1973); *International Brotherhood of Teamsters* v. *United States,* 45 U.S.L.W. 4507, 4508-11, 4515 (1977). Where such a pattern of discrimination is established the burden of proof shifts to the defendant to establish that individual class members were not victims of that policy. *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 773 n. 32 (1976).

Petitioners suggested below that any evidence of class wide discrimination which respondent might discover or introduce would be irrelevant to respondent's individual claim because they had allegedly established that there were justifiable non-discriminatory reasons for company actions toward Donaldson. This is precisely the argument rejected by this Court in *McDonnell Douglas.* There, as here, the employer urged statistics were "of no utility" since the company had shown a legitimate reason for its action and "the District Court examined an extensive record of the treatment accorded to Green during his prior employment and found that his protestations of discrimination were more imagined than real." [6] This Court held that, even if there was an arguably proper ground for the employer's action, the employee "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover-up for a racially discriminatory decision," and that the evidence "that may be relevant to any showing of pretext" includes the employer's "general policy and practice with respect to minority employment." *McDonnell Douglas Corp.* v. *Green,* 411 U.S. at 804-05. That is precisely the type of retrial directed by the court of appeals in this case.

[6] Petitioner's Reply to Respondent's Brief, No. 72-490, p. 13.



Ignoring the problem of restricted discovery noted by the court of appeals,[7] and apparently now conceding that the district court erred in excluding evidence of class wide discrimination, petitioners emphasize in the alternative that the district judge stated he "had considered" the statistical and other class wide evidence offered by respondent. Petition, p. 18. The district judge, however, did not find there was no pattern of discrimination, or that the implications of such a pattern had been overcome by other evidence, but stated that he still believed it to be irrelevant. A-29. The district court's refusal to give any weight to evidence of a pattern of discrimination was clear error under *McDonnell Douglas.*[8]

3. The third question raised in the petition is literally a hypothetical one: *"If* the District Court's dismissal of Marceline Donaldson's individual claims is affirmed, no class having ever been certified in the District Court, can any class be adequately represented in subsequent proceedings in this action before the District Court?" This case simply does not present that question, since the dismissal of the individual claims was reversed on appeal, and

[7] Limitations on discovery were among the reasons cited by this Court for ordering a new trial in *McDonnell Douglas.* 411 U.S. at 800, n. 10.

[8] In *McDonnell Douglas* itself the plaintiff also succeeded in placing in the record before the district court statistics as to the company's general employment practices, and the company suggested that a remand for new trial was therefore inappropriate. Petitioner's Reply to Respondent's Brief, p. 13. The district court in *McDonnell Douglas* had not ruled such evidence irrelevant, but merely failed to discuss it. *Green* v. *McDonnell Douglas Corp.,* 318 F. Supp. 846, 850-51 (E.D. Mo. 1970). This Court nonetheless concluded that a new trial was necessary. 411 U.S. at 807.

it is unlikely that the question will ever arise in subsequent proceedings in this action.[9]

4. Assuming arguendo that the "Questions Presented" were actually presented by this case, none of them would warrant review by this Court. Certification of a class by a court of appeals in the first instance is an uncommon occurrence, and this was not the issue on which certiorari was granted in *Rodriguez*.[10] Whether the court of appeals' decision regarding class certification and the individual claims is supported by the record is of significance in this case alone. Since the action has been remanded for further proceedings, it is likely that some if not all of the issues now pressed by petitioners will be rendered moot by the subsequent proceedings; certainly that will be the case as to the remand of the individual claims, which petitioners oppose only as unnecessary. Petition, p. 18. Petitioners do not assert that any aspect of the decision below is in

[9] We note that the answer to the question raised by petitioners can readily be resolved by reference to the nature and history of the class claims. If the case is, regardless of the status of the individual claim, not a proper class action, the adequacy of plaintiff's representation is irrelevant. If the case would otherwise be a proper class action, but plaintiff never sought certification and her individual claim was properly dismissed, the case would be identical to *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 45 U.S.L.W. 4524 (1977). If the district court heard but erroneously failed to grant a request to certify the class prior to dismissing the individual action, that error could and should be corrected on appeal, since the contrary rule would necessitate interlocutory appeals of all denials of class action certification. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949).

[10] The class action question in the *Rodriguez* petition was "Whether absent a class action hearing or an equivalent opportunity to present evidence on the question of the appropriateness of the class the Court of Appeals may certify the litigation as a class action and enter a finding of liability in favor of the Plaintiff class."



conflict with any other circuit on any issue of law, important or otherwise.

This case also presents a number of independent grounds for affirming the decision of the court of appeals. First, in connection with respondent's unsuccessful interlocutory appeal of the denial of class certification, the clerk of the district court in St. Paul transmitted the entire 30 volume pre-trial record to the court of appeals in St. Louis, where it remained until sometime after February 9, 1976. In the interim, despite plaintiff's request for a continuance, the district judge insisted on trying the case and rendered his final decision on February 5, 1976. Although the district judge recited that he had "considered" all of plaintiff's proffered evidence, that was physically impossible. Second, at the end of trial the district judge agreed to defer any decision until certain depositions had been taken and filed, but then decided the case seven days later without awaiting the transcription and filing of the depositions. App. 17a, 1216a-17a. Third, the district court's decision to severely limit plaintiff's discovery was clearly erroneous in light of *McDonnell Douglas* and *Teamsters*. The court of appeals, because of its resolution of other questions, found it unnecessary to resolve these issues, but they furnish alternative grounds for upholding its decision and thus render inappropriate a grant of certiorari.

## CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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